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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 EMBOTELLADORA ELECTROPURA
12 S.A. de C.V., an El Salvador corporation,
13 Plaintiff,

14 v.

15 ACCUTEK PACKAGING EQUIPMENT
16 COMPANY, INC., a California
17 corporation; and DOES 1 through 25,
inclusive,

18 Defendant.
19

Case No.: 3:16-cv-00724-GPC-DHB

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION FOR
PARTIAL SUMMARY JUDGMENT**

[ECF No. 26]

20 Before the Court is Defendant Accutek Packaging Equipment Company, Inc.’s.
21 (“Accutek”) motion for partial summary judgment (ECF No. 26) to enforce the
22 limitation on liability provision contained within the purchase agreement executed with
23 Plaintiff Embotelladora Electropura S.A. de C.V. (“Electropura”). The motion has been
24 fully briefed. Plaintiff filed an opposition on June 9, 2017 (ECF No. 30), and Accutek
25 filed a reply on June 16, 2017 (ECF No. 31). Upon consideration of the moving papers
26 and the applicable law, and for the reasons set forth below, the Court **GRANTS in part**
27 and **DENIES in part** Defendant’s motion for partial summary judgment.

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Plaintiff now seeks relief for the fact that the machine it purchased allegedly does not operate as promised by Defendant and as required by Plaintiff's stated business needs. Plaintiff has brought seven claims against Accutek for: 1) fraudulent misrepresentation and conspiracy to defraud; 2) fraudulent concealment and conspiracy to defraud; 3) negligent misrepresentation; 4) breach of written contract; 5) breach of express warranty; 6) breach of implied warranty; and 7) restitution and unjust enrichment. Plaintiff seeks to recover for lost sales, lost profits and other general, special, consequential and punitive damages.

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LEGAL STANDARD

Federal Rule of Civil Procedure (“Rule”) 56 empowers courts to enter summary judgment on factually unsupported claims or defenses, and thereby “secure the just, speedy and inexpensive determination of every action.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 327 (1986). Summary judgment is appropriate if the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). A fact is material when it affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The moving party bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex*, 477 U.S. at 323. The moving party can satisfy this burden by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element of his or her claim on which that party will bear the burden of proof at trial. *Id.* at 322-23. If the moving party fails to bear the initial burden, summary judgment must be denied and the court need not consider the nonmoving party’s evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970).

Once the moving party has satisfied this burden, the nonmoving party cannot rest on the mere allegations or denials of his pleading, but must “go beyond the pleadings and by her own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file’ designate ‘specific facts showing that there is a genuine issue for trial.’” *Celotex*, 477 U.S. at 324. If the non-moving party fails to make a sufficient showing of an element of its case, the moving party is entitled to judgment as a matter of law. *Id.* at 325. “Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *First Nat’l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)). In making this determination, the court must “view[] the evidence in the light most favorable to the nonmoving party.” *Fontana v.*

1 *Haskin*, 262 F.3d 871, 876 (9th Cir. 2001). The court does not engage in credibility
2 determinations, weighing of evidence, or drawing of legitimate inferences from the facts
3 as those functions are for the trier of fact. *Anderson*, 477 U.S. at 255.

4 It is proper to grant partial summary judgment on elements of the damages claimed
5 and in order to enforce a limitation on liability. *See California v. Kinder Morgan Energy*
6 *Partners, L.P.*, 159 F. Supp. 3d 1182 (S.D. Cal. 2016) (granting partial summary
7 judgment and finding that plaintiff was precluded from seeking damages covered by the
8 limitation on liability provision); *see also FiTeq Inc. v. Venture Corp.*, 169 F. Supp. 3d
9 948, 955-56 (N.D. Cal. 2016); *Agricola Baja Best v. Harris Moran Seed Co.*, 44 F. Supp.
10 3d 974, 988-94 (S.D. Cal. 2014).

11 **DISCUSSION**

12 The parties have not raised any factual disputes. Dkt. No. 26-1 at 5; Dkt. No. 30 at
13 4. Instead, their moving papers solely dispute the validity of the limitation on liability
14 (“LOL”) provision contained within the Monoblock’s Purchase Agreement. The plain
15 language of the LOL provision limits Plaintiff’s damages to the purchase price of the
16 defective equipment. Defendant argues that this limitation is enforceable under the
17 California Commercial Code. *See* Cal. Com. Code § 2719(1)(b)(3). Defendant moreover
18 argues that the LOL provision limits the damages that Plaintiff can collect regardless of
19 whether Plaintiff prevails on its contract-based claims or its fraud-based claims. Plaintiff,
20 in turn, argues that the LOL provision is not enforceable because it is void against public
21 policy under Cal. Civ. Code § 1668, which generally prohibits parties from contracting
22 away liability for fraud and other intentional wrongs. The Court will address each of
23 these arguments in turn.

24 **A. Limitation on Liability Provision**

25 “Under California law, parties may agree by their contract to the limitation of their
26 liability in the event of a breach.” *Nat’l Rural Telecomm. Coop. v. DIRECTTV, Inc.*, 319
27 F. Supp. 2d 1040, 1048 (C.D. Cal. 2003). Such limitation clauses “have long been
28 recognized as valid in California.” *Markborough Calif., Inc. v. Superior Court*, 227 Cal.

1 App. 3d 705, 714 (1991). “In the majority of commercial situations, courts have upheld
2 contractual limitations on liability, even against claims that the breaching party violated a
3 law or regulation.” *CAZA Drilling, Inc. v. TEG Oil & Gas U.S.A., Inc.*, 142 Cal. App. 4th
4 453, 472 (2006).

5 “Any contract of release from negligence must be clear and explicit, free of
6 ambiguity or obscurity, and tell the prospective releasor he or she is releasing the other
7 from liability, including negligence. The language must be comprehensible.”
8 *Conservatorship of Link*, 158 Cal. App. 3d 138, 143 (1984). “Contractual clauses
9 seeking to limit liability will be strictly construed and any ambiguities resolved against
10 the party seeking to limit its liability” *Nunes Turfgrass, Inc. v. Vaughan–Jacklin*
11 *Seed Co.*, 200 Cal. App. 3d 1518, 1538 (1988). However, if a court finds the “wording to
12 be unambiguous and its meaning to be clear,” the limitation on liability clause can be
13 enforced. *Philippine Airlines, Inc. v. McDonnell Douglas Corp.*, 189 Cal. App. 3d 234,
14 238 (1987).

15 The limitation on liability clause at issue in this dispute reads as follows:

16 In no event shall Accutek be liable for any indirect, incidental, punitive,
17 special consequential damages, or damages for loss of profits, product,
18 production, revenue, or loss incurred by customer or any third party, weather
19 [sic] in an action, in contract, or tort, or otherwise even if advised of the
20 possibility of such damages. Accutek’s liability for damages arising out of
21 or in connection with this agreement shall in no event exceed the purchase
22 price of the defective equipment. The provisions of this agreement allocate
the risks between company and customer. Accutek’s pricing reflects this
allocation of risk and but for this allocation and limitation of liability,
Accutek would not have entered into this agreement.

23 Dkt. No. 26, Exhibit A at 2. Defendant asks the Court to enforce the plain import of this
24 provision. Specifically, Defendant petitions the Court to find that any damages arising
25 from the sale of the Monoblock exclude recovery for “incidental, consequential, or
26 punitive damages” and are “capped at the purchase price of the machinery.” *Id.* at 5.

27 Plaintiff’s opposition does not respond to Defendant’s interpretation of the LOL
28 provision. It does not assert that the clause is ambiguous or that it is subject to another

1 reasonable interpretation. *See Castaneda v. Dura-Vent Corp.*, 648 F.2d 612, 619 (9th
2 Cir. 1981) (“A contract or a provision of a contract is ambiguous if it is reasonably
3 susceptible of more than one construction or interpretation.”). As such and because the
4 plain meaning of the clause supports Defendant’s interpretation, the Court concludes that
5 the LOL provision limits Defendant’s liability to the purchase price of the defective
6 equipment and that it precludes Defendant from liability for any incidental, consequential
7 or punitive damages. *See FDIC v. Air Florida Sys., Inc.*, 822 F.2d 833, 836 n.2 (9th Cir.
8 1987) (“The meaning of contractual terms and whether they are ambiguous are questions
9 of law.”); *Am. Alt. Ins. Corp. v. Superior Court*, 135 Cal. App. 4th 1239, 1245-46 (2006)
10 (where contractual language is clear and explicit and does not involve an absurdity, the
11 plain meaning governs).

12 **B. California Commercial Code § 2719**

13 Section 2719 of the California Commercial Code, California’s enactment of the
14 Uniform Commercial Code, provides the following with respect to limitations on
15 remedies:

16 Consequential damages may be limited or excluded unless the limitation or
17 exclusion is unconscionable. Limitation of consequential damages for injury
18 to the person in the case of consumer goods is invalid unless it is proved that
19 the limitation is not unconscionable. Limitation of consequential damages
where the loss is commercial is valid unless it is proved that the limitation is
unconscionable.

20 Cal. Com. Code § 2719(1)(b)(3); *see also Westlye v. Look Sports, Inc.*, 17 Cal. App. 4th
21 1715, 1739 (1993) (providing that limitation on damages in sale of goods contract is valid
22 unless unconscionable). The California Commercial Code is applicable to the contract at
23 issue because the sale of the Monoblock constitutes a “transaction in goods.” *See* Cal.
24 Com. Code § 2102 (“Unless the context otherwise requires, this division applies to
25 transactions in goods.”). Accordingly and in the absence of any argument from Plaintiff
26 that the commercial code does not govern this dispute, the Court concludes that the LOL
27 provision is governed by § 2719. The LOL provision, therefore, is valid unless
28 unconscionable. *See* Cal. Com. Code § 2719(1)(b)(3).

1 Unconscionability turns on “the absence of meaningful choice on the part of one of
2 the parties together with contract terms which are unreasonably favorable to the other
3 party.” *Sonic–Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1145 (2013) (internal
4 citations omitted). The procedural element of unconscionability focuses on “oppression
5 and surprise, whereas the substantive element asks whether the terms “shock the
6 conscience” or are “unreasonably one-sided.” *Agricola*, 44 F. Supp. 3d at 991-92. The
7 burden of proving unconscionability under § 2719(1)(b)(3) lies with the plaintiff
8 opposing a defendant’s summary adjudication motion. *Westlye*, 17 Cal. App. 4th at 1739
9 (“Thus we believe it was plaintiff’s burden to raise the unconscionability issue in the trial
10 court.”); *see also Williams v. Cal. Physicians’ Serv.*, 72 Cal. App. 4th 722, 742 (1999) (“a
11 defendant who relies on contract terms in moving for summary judgment need not
12 establish the contract is *not* unconscionable, unless the plaintiff’s complaint alleged facts
13 suggesting unconscionability.”) (emphasis in original).

14 Plaintiff, here, has failed to raise any factual allegations concerning the
15 unconscionability of the Monoblock purchase agreement. Despite the fact that Defendant
16 squarely addressed the applicability of Section 2719 and the commercial code in its
17 motion for partial summary judgment, Plaintiff’s opposition makes only one passing
18 reference to unconscionability. *See* Dkt. No. 30 at 4 (arguing without explanation that
19 “the void and unenforceable nature of the ‘Limitation on Liability’ renders it
20 unconscionable, as a matter of law.”). Plaintiff’s statement of facts, however, says
21 nothing about the circumstances surrounding the execution of the contract and Plaintiff
22 makes no other argument within the parameters of California’s jurisprudence on
23 unconscionability. As such, and in light of the fact that Plaintiff has failed to carry its
24 burden of demonstrating that the LOL provision is unconscionable, the Court concludes
25 that the LOL provision is enforceable under Cal. Com. Code § 2719(1)(b)(3). *See*
26 *Westlye*, 17 Cal. App. 4th at 1739.

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1 **C. California Civil Code § 1668**

2 The parties next dispute concerns whether Cal. Civ. Code § 1668 nonetheless bars
3 enforcement of the LOL provision. Section 1668 reflects the policy of “th[e] state [of
4 California] to look with disfavor upon those who attempt to contract away their legal
5 liability to others for the commission of torts.” *Blankenheim v. E.F. Hutton & Co.*, 217
6 Cal. App. 3d 1463, 1471 (1990).¹ The statute provides that:

7 All contracts which have for their object, directly or indirectly, *to exempt*
8 *anyone from responsibility for his own fraud*, or willful injury to the person
9 or property of another, or violation of law, whether willful or negligent, are
 against the policy of the law.

10 Cal. Civ. Code § 1668 (emphasis supplied). Under Section 1668, “a party cannot
11 contract away liability for his fraudulent or intentional acts or for his negligent violations
12 of statutory law.” *Health Net of Cal., Inc. v. Dep’t of Health Servs.*, 113 Cal. App. 4th
13 224, 233 (2003) (emphasis removed). California courts have held that both intentional
14 and negligent misrepresentations are included within the scope of § 1668’s reference to
15 “fraud.” *McClain v. Octagon Plaza, LLC*, 159 Cal. App. 4th 784, 794 (2008).

16 Defendant argues that Cal. Civ. Code § 1668 has no applicability in this case
17 because “California’s Uniform Commercial Code preempts Section 1668.” Dkt. No. 26-
18 1 at 9. More specifically, Defendant explains that “in transactions in goods governed by
19 the UCC, Section 1668 is wholly preempted—including as to fraud claims—and
20 limitations on liability are analyzed solely under the standard of Commercial Code
21 § 2719.” In other words, Defendant is arguing that the validity of the LOL provision
22 under § 2719(1)(b)(3) prevents Plaintiff from recovering any damages beyond the
23 purchase price of the Monoblock for its contract claims and for those tort claims
24 grounded in fraud.

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28 ¹ Plaintiff mistakenly refers to *Blankenheim* as a California Supreme Court case in its opposition motion.
Dkt. No. 30.

1 The Court disagrees that Section 2719(1)(b)(3) operates in the way Defendant
2 claims. The comments accompanying § 2719(1) state that “Under this section parties are
3 left free to shape their remedies to their particular requirements and *reasonable*
4 agreements limiting or modifying remedies are to be given effect.” Cal. Com. Code.
5 § 2719 (emphasis supplied). A limitation on liability provision, however, that precludes a
6 party from recovering damages for fraud or misrepresentation is not reasonable under
7 California law.

8 Defendant’s interpretation of the scope of § 2719(1)(b)(3) is also unreasonable
9 given California’s long-standing policy against enforcing limitations on liability for fraud
10 or misrepresentation. *See Food Safety Net Servs. v. Eco Safe Sys., USA, Inc.*, 209 Cal.
11 App. 4th 1119, 1126 (2012) (“... limitation of liability clauses are ineffective with
12 respect to claims for fraud and misrepresentation.”); *Manderville v. PCG & S Grp., Inc.*,
13 146 Cal. App. 4th 1486, 1500 (2007) (“It is well-established in California that a party to a
14 contract is precluded under section 1668 from contracting away his or her liability for
15 fraud or deceit based on intentional misrepresentation.”); *Farnham v. Superior Court*
16 (*Sequoia Holdings, Inc.*), 70 Cal. App. 4th 69, 71 (1997) (“... contractual releases of
17 future liability for fraud and other intentional wrongs are invariably invalidated.”);
18 *Blankenheim*, 217 Cal. App. 3d at 1471 (“a party may not contract away liability for
19 fraudulent or intentional acts”);

20 The Court moreover notes that Defendant’s argument regarding the scope of
21 Section 2719 is also unsupported by the law. Defendant has failed to produce any case
22 where a court has upheld a limitation on liability provision as to a claim for fraud or
23 misrepresentation. Instead, Defendant relies exclusively on the factually-distinct
24 decisions rendered in *Nunes* and *Agricola* to argue that Section 2719 somehow
25 “preempts” application of Section 1668. Dkt. No. 26-1 at 12 (*Nunes* and *Agricola* “stand
26 for the principle that in transactions in goods covered by the UCC, Section 1668 is
27 wholly preempted—including as to fraud claims—and limitations on liability are
28 analyzed solely under the standard of Commercial Code § 2719.”).

1 The Court, however, disagrees that the holdings of *Nunes* and *Agricola* support
2 Defendant's argument. Neither *Nunes* nor *Agricola* concluded that a limitation on
3 liability provision can insulate a defendant from liability for fraud or intentional conduct.
4 *Nunes*, 200 Cal. App. 3d at 1532-39 (wherein plaintiffs challenged the limitation on
5 liability provision under Section 1668 as insulating defendant from liability for negligent
6 violation of the law rather than from liability for fraud); *Agricola*, 44 F. Supp. 3d at 993
7 (holding that LOL provision was enforceable because a party can limit its damages for a
8 negligent statutory violation notwithstanding Section 1668). Accordingly, and in the
9 absence of any California case holding that commercial parties can limit their liability for
10 fraudulent or intentional acts, the Court will uphold California's policy against enforcing
11 limitations on liability as to claims for fraud or misrepresentation.

12 In sum, the Court finds that limitations on liability, regardless of whether they are
13 presumptively valid under Section 2719(1)(b)(3) of the California Commercial Code,
14 cannot limit a defendant's liability for fraud or misrepresentation. *See Fontana Prods.*
15 *Inc. v. Spartech Plastics Corp.*, 6 Fed. App'x 591, 595 (9th Cir. 2001) (concluding that
16 damage waiver capping liability to purchase price of the product could not limit
17 defendant's liability for fraud notwithstanding § 2719). Accordingly, the Court
18 concludes that the LOL provision at issue here reaches as far as Plaintiff's claims for
19 fraud and negligent misrepresentation. The LOL provision, therefore, binds Plaintiff as
20 to its contract-based claims, but does not bind Plaintiff insofar as it claims that Defendant
21 has committed fraud and engaged in negligent misrepresentation. *See FiTeq Inc. v.*
22 *Venture Corp.*, 169 F. Supp. 3d 948, 956 (N.D. Cal. 2016) (holding that because Section
23 1668 renders limitation of liability "unenforceable to the extent that it would insulate
24 defendants from liability for fraud or willful injury," limitation on liability provision only
25 operated on breach of contract claims and not claims for fraud and fraud in the
26 inducement); *see also Peregrine Pharm., Inc. v. Clinical Supplies Mgmt., Inc.*, 2014 WL
27 3791567, *15 (C.D. Cal. Jul. 31, 2014) (holding that limitation on liability clauses are
28 inapplicable to claims for negligent misrepresentation and constructive fraud).

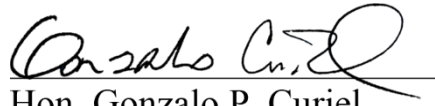
1 In reaching this decision, the Court rejects Plaintiff's contention that it must
2 declare the entire LOL provision unenforceable because it violates Section 1668's policy
3 against exempting a party from its fraud or intentional acts. Dkt. No. 30 at 18
4 ("contractual provisions which are void, illegal and unenforceable because they
5 contravene public policy are *entirely void*, and cannot, therefore, be afforded any limited
6 or circumscribed application.") (emphasis in original). For one, none of the cases cited
7 by Plaintiff stands for the proposition that it asserts. *See S. Bay Senior Hous. Corp. v.*
8 *City of Hawthorne*, 56 Cal. App. 4 1231, 1235 (1997) (standing for proposition that when
9 a contracting party does not have power to enter into a contract, contract is void and "no
10 implied liability can arise under that contract"); *Hooper v. Barranti*, 81 Cal. App. 2d 570,
11 574 (1947) (making general observation that contracts which are against public policy are
12 void and cannot sustain any action); *Del Rey Realty Co. v. Fowl*, 44 Cal. App. 2d 299,
13 402-03 (1941) (standing for general proposition that illegal contracts cannot be enforced).
14 Two, Plaintiff's argument also fails because it ignores the fact that Section 2719(1)(b)(3)
15 specifically upholds limitation on liability provisions that are not unconscionable.
16 Accordingly, and absent any argument that Section 1668 undermines the presumptive
17 validity of limitations on liability governed by Section 2719, the Court will not conclude
18 that the LOL provision must be declared entirely void. *See Nunes*, 246 Cal. App. 3d at
19 1538 (concluding that to the extent Section 2719 and Section 1668 conflict, the former
20 controls because it is the more specific statute and therefore controls the measure of
21 damages).

22 CONCLUSION

23 The Court **GRANTS** in part and **DENIES** in part Defendant's motion for partial
24 summary judgment. The LOL provision is enforceable to the extent that it does not
25 insulate Defendant from liability for fraud or misrepresentation. Accordingly, the Court
26 **GRANTS** Defendant's motion as to Plaintiff's fourth through seventh contract-based
27 causes of action, but **DENIES** Defendant's motion as to Plaintiff's first through third
28 causes of action, which are grounded in fraud and misrepresentation.

IT IS SO ORDERED.

Dated: August 2, 2017


Hon. Gonzalo P. Curiel
United States District Judge